the creditor whose debt is overthrown to the extent of that debt; and, if not, to hold his position as a preferred creditor. With the exception of that clause, the whole deed is valid as to him, and he can truly be considered as claiming "under and against the deed at the same time." In the *latter*, the creditor issued an attachment and sought to subject the property conveyed in the deed, on the ground that it was not duly recorded. The deed, of itself, if not recorded, was void *in toto* as to him, and he only raised the point as to whether the circumstances of the transfer and sale of the property by the trustees was equivalent to the recordation of the deed. In short, in the latter the main question was one of compliance with the statute, while in the former one of the provisions of the deed itself is questioned, attacked, and set aside as fraudulent.

But see, *contra*, *Peters v. Bain*, 133 U. S. 670, 696.

WM. W. OLD, JR.

Norfolk, Va..

RIGHT TO RECOVER PREMIUMS PAID ON A VOID POLICY.

A question of considerable interest and importance in litigation relative to contracts of insurance was decided by a Circuit Court in a recent case, in which the writer was of counsel for plaintiff.

The declaration alleged that the plaintiff had taken out a policy of insurance on the life of one in whom he had no insurable interest, and that he was entitled, the policy being void because of his lack of such interest, to a recovery against the defendant (the insurance company) of the premiums by him at divers times paid thereon. To this declaration the defendant demurred, and the demurrer was overruled by the court and judgment entered up for plaintiff.

It was vigorously contended by the defense that it ought to appear that the invalidity of the policy was known to the company in order to entitle the plaintiff to recover, if, indeed, even that were sufficient. The main ground relied upon by defendant was, that where the assured has no insurable interest in the life of the insured, the policy is invalid, because, in such a case the contract is purely wagering in its character, and, of course, for that reason, illegal, as well as for the additional reason, founded on sound public policy, that to uphold the

contract under such circumstances would be to hold out an inducement to the beneficiary to procure the death of the insured, and, therefore, *contra bonos mores*, and that the court would grant no relief to either party, but, upon the common principle that *in pari delicto, melior conditio defendentis*, leave them *in statu quo*.

That the first of these positions is untenable is easily perceptible. Whether the company knew or not, at the time of issuing the policy, that it was invalid, the fact remains that in a suit to recover on the policy, had a loss occurred, the insurer would have been entitled to the benefit of the invalidity to defeat the action, and, the policy being void *ab initio*, there was no consideration for the premiums paid.

The other question raised by the demurrer is one of more difficulty, but an examination of the authorities shows it to be equally fallacious with the first.

It is an elementary proposition that the doctrine of *in pari delicto* is applicable to *executed* contracts only and not to such as remain *executory*, for the reason that in the latter class of cases the law holds out to the party advancing money under the illegal contract the right to recover the sums so advanced by him, by way of inducement to recede from it, and thereby prevent the execution of an unlawful act, which reason fails in the case of an executed contract, the act having been already done. 2 Greenleaf on Evidence, sec. 111; *Congress etc. Co. v. Knowlton*, 103 U. S. 49.

The case in 103 U. S., just cited, seems to be a step in advance of the rule, since there the party who had advanced money under an illegal agreement was permitted to recover it, although the agreement *had been abandoned by both parties*, which, it would seem, would do away with the necessity for allowing a recovery to prevent its execution. The opinion of the court, however, contains a strong presentation of the doctrine in support of which it is here cited. Reference is made by the court to 2 Comyn on Cont. 361; 2 Pars. Cont. 746; 2 Add. Cont. 1412; Chitty Cont. 944; 2 Story Cont. 617, and to numerous cases adjudged by the English courts, and a few American cases, notably, *Morgan v. Groff*, 4 Barb. 524, quoting freely from the text-writers mentioned.

It may be well to insert here the language of Comyn, quoted in the opinion just referred to:

"Where money has been paid upon an illegal contract, it is a general rule that if the contract be executed and both parties are *in pari delicto*, neither of them can recover from the other the money so paid, but if the contract continues executory,

and the party paying the money be desirous of rescinding it, he may do so and recover back by *indebitatus assumpsit* for money had and received. And this distinction is taken in the books, that where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly, such an action can in no case be maintained, but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, then it is consonant to the spirit and policy of the law that the plaintiff should recover."

In Angell on Fire and Life Ins., sec. 405, it is said that the premium may be recovered where the policy is void for want of insurable interest. At first sight, a statement, in sec. 407 of the same volume, seems to be contradictory of this, but a careful consideration of both will show that it is not so in fact. In sec. 407 it is said that no recovery can be had where the policy is void for "illegality," but the illegality here meant is that which exists in the subject-matter of insurance. In fact this appears in the note to sec. 29 of the same work (to which reference is made in a foot-note to sec. 407), the illustrations there given being instances of insurance on lotteries and on bets on horse races. See, also, 1 May on Ins. (2d ed.), secs. 4, 71.

It has sometimes been held that where the beneficiary under an assignment of the policy is not permitted to recover the amount of the policy, after the death of the insured, the personal representative of the latter may. It will be found, however, that in such instances the insured took out the policy himself, and the payments made by the other party were, under the circumstances of the case, treated as loans to him. See *Roller v. Moore*, 86 Va. 512. It would be absurd to give the personal representative any such right of recovery where the beneficiary named in the policy himself takes it out, and pays the premiums for his own benefit.

A doubt as to the right to recover the premiums arises where suit is postponed until after the death of the insured, and in an English case, cited by Mr. Chitty in a foot-note to page 944 of his work on Contracts (11th Am. ed.), it seems to have been held that such right does not exist. The object of the rule, namely, to prevent the doing of an unlawful act, which, in the case under immediate consideration, is the carrying of a policy of insurance by one person upon the life of another in whom he has no insurable interest, cannot be accomplished when the death of the insured has already occurred, and hence, the reason of the rule having ceased, it would seem to be very proper that the rule itself should, in such a case, be not applied. And there is

another consideration going to support this idea. At common law, money lost upon an illegal bet or wager could not be recovered after the event upon which the wager was laid and the turning over of the stakes to the winner. The analogy is very close between a case of this sort and that of a wagering policy, after the death of the insured, the company being already in possession of the premiums. No reason is perceived for a difference in holding in the case of a wager policy and that of an ordinary wager not permitted by law.

It will be observed that with us, under sec. 2837 of the Code, money lost on a wager may be recovered, even after it has been paid over to the winner upon the happening of the event.

It is proper to refer here to the case of *Mutual Assurance Company v. Mahon*, 5 Call, 517 (which was a case of a wager policy of insurance against fire), in which our court held that, there having been no fraud on the part of the person effecting the insurance, he was entitled to a return of the premiums paid by him, and that, too, after the occurrence of the loss, *in a suit to enforce payment of the amount of the policy.*

The compass of this article does not permit us to enter very fully into a discussion of the general principles governing the application of the maxim, *in pari delicto*, interesting as its study is, but it may be not unprofitable to take a hasty survey of a few of the adjudged cases in which the rule has been considered. A casual examination of these cases is sufficient to show that the maxim is an exceedingly pliable one, and that the courts, in administering it, look not so much either to the punishment of one of the parties or to the relief of the other, as to the promotion of the best interests of society. If the facts presented are of such a nature that it would less subserve this purpose to enforce the rule strictly, it will be modified accordingly.

It is a mistake to suppose that it necessarily follows that in every case in which, under the circumstances, there is guilt in both parties to an agreement, they will be treated as equally guilty. While the courts will not enter into minute consideration of the facts and draw nice distinctions in the degrees of guilt of the parties, still, where it appears that there is considerable difference in their criminality, or that, while alike guilty, one acted under the moral coercion of the other, relief will not be denied to the comparatively innocent party, even in case of a fully executed contract.

Most of the decisions dealing with this maxim are of cases wherein the contract sought to be relieved against was entered into with the

intention of perpetrating a fraud upon a third party, *e. g.*, a creditor of one of the parties to the contract. Of this nature is *Austin v. Winston*, 1 H. & M. 32, wherein relief was granted to a *particeps criminis*, he being held not to have acted freely in the matter, the other party being his creditor and having, by virtue of that relation, procured the making and execution of the agreement. Such, also, were the cases of *Starke v. Littlepage*, 3 Rand. 368, *James v. Bird*, 8 Leigh, 510, and *Owen v. Sharpe*, 12 Leigh, 439; in all of which (the contract having been executed) the court declined to disturb the condition of affairs resulting from fraudulent combinations against creditors.

The case of *Harris v. Harris*, 23 Gratt. 737, will be found of great benefit to the student of this subject. The arguments of counsel (which appear in the report) and the opinions of the judges of the court contain able and exhaustive reviews of the authorities applicable to the particular question in connection with the maxim there determined. It was there held that where a person, as part of a scheme to defraud his creditors, executes a bond founded upon no consideration, and suit is afterwards instituted thereon by the obligee against him, he cannot set up the intended fraud to prevent a recovery, the maxim *nemo allegans suam turpitudinem, audiendus est*, applying in full force to such case, and that of *in pari delicto* having no application.

As illustrative of the great flexibility of the rule under consideration, in order to the accomplishment of its purpose, we insert here the language of Judge Green (in the case of *Owen v. Sharpe, supra*), quoted in the last mentioned case of *Harris v. Harris:*

"It is a general rule that *in pari delicto portior est conditio defendentis*, and this was the principle of the civil law. But this rule operates only in cases where the refusal of the courts to aid either party frustrates the object of the transaction and takes away the temptation to engage in contracts *contra bonos mores*, or violating the policy of the law. If it be necessary in order to discountenance such transactions, to enforce such a contract at law, or to relieve against it in equity, it will be done, though both the parties are *in pari delicto*. The party is not allowed to allege his own turpitude in such cases, when defendant at law, or prevented from alleging it when plaintiff in equity, whenever the refusal to execute the contract at law, or the refusal to relieve against it in equity, would give effect to the original purpose and encourage the parties engaging in such transactions."

It will be perceived that the reasoning upon which all of these cases in the Court of Appeals proceed is directly in line with that adduced in support of the holding of the Circuit Court in the controversy referred to at the beginning of this article, the ultimate aim always kept in view being to discourage contracts in opposition to the policy of the

law. An able and lengthy discussion of the doctrine may also be found in *Smith v. Elliott*, 1 P. & H. 307.

It is well settled that where it is sought to recover payments of usurious interest, and in other cases where the law is for the protection of one of the parties against the other, the doctrine of *in pari delicto* has no application. See *Moseley v. Brown*, 76 Va. 419. In most of the Virginia cases hitherto cited this question is also briefly considered.

In *Gray v. Roberts* (Ky.), 12 Am. Dec. 383, it is held that money paid for lottery tickets may be recovered, when the lottery is prohibited by law, the law being for the protection of the purchasers. Attention is called to the editor's note to this case.

In *Carpenter v. McClure*, 91 Am. Dec. 370, the Supreme Court of Vermont announced the same rule as that laid down in *Harris v. Harris, supra.*

One of the latest adjudications involving the application of the maxim is *Bradtfeldt v. Cook* (Oreg.), 50 Am. St. Rep. 701, wherein *Harris v. Harris, supra,* is cited with approval by the court.

For a good discussion of the rule and its application, see note to *Collins v. Blantern*, 1 Sm. Lead. Cas. (9 Am. ed.) 662. See, also, *Burtners v. Keran*, 24 Gratt. 42, 70; *Barnett v. Barnett*, 83 Va. 508; *Smith v. Chilton*, 84 Va. 840; extensive note, 3 Am. St. Rep. 727.

D. O. DECHERT.

Harrisonburg, Va.

THE LIABILITY OF INFANTS FOR TORTS CONNECTED WITH CONTRACTS.

An infant is liable for his torts. "If an infant commit an assault or utter slander," said Lord Kenyon, "God forbid that he should not be answerable for it in a court of justice."

But when the tort is connected with a contract the question becomes more complicated, for an infant's contract is not binding upon him.

The leading case upon the subject is *Vasse v. Smith*, 6 Cranch, 226, s. c. 1 H. & W. Am. Lead. Cases, 293. In this case it was decided, among other things, that—

(1) In an action on the case the declaration shows upon the face that the tort is merely constructive, being in effect but a breach of contract, and a plea of infancy is a bar.